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WILLIAM L. STEVENS

NO. 83-1810

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IN THE SUPREME COURT  
OF THE UNITED STATES

OCTOBER TERM, 1983

\*\*\*\*\*

STANLEY MILLER, PETITIONER

v.

PORT OF ILWACO, A WASHINGTON MUNICIPAL  
CORPORATION, AND ROBERT PETERSEN,  
INDIVIDUALLY, AND AS PORT MANAGER

\*\*\*\*\*

BRIEF IN OPPOSITION TO PETITION FOR  
A WRIT OF CERTIORARI TO THE COURT OF  
APPEALS OF THE STATE OF WASHINGTON

\*\*\*\*\*

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## REASONS FOR DENYING THE PETITION

### REASON NO. 1

Division II of the Court of Appeals for the State of Washington was correct in finding that this action is a simple breach of contract case between private parties.

### REASON NO. 2

The Petitioner did not acquire a "property right" for due process purposes in berth P-58 merely because he temporarily docked his vessel in such berth.

### REASON NO. 3

In view of the fact that Petitioner did not acquire a "property right" in berth P-58, the Respondent was justified in moving Petitioner's vessel from berth P-58 without according the Petitioner the due process rights of notice and a hearing.

REASON NO. 4

The Respondent was justified, pursuant to its police powers, in moving the Petitioner's vessel in view of the hazard Petitioner's vessel represented to the other vessels within the Port.

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Respondent, by and through its  
attorney, Daniel G. Marsh, opposes the  
Petition for a Writ of Certiorari to  
review the judgment of Division II of  
the Court of Appeals of the State of  
Washington.



## OPINIONS BELOW

The opinion of Division II of the Washington Court of Appeals (attached hereto as Appendix A, *infra*) is an unpublished opinion.

The decision of Division II of the Court of Appeals of the State of Washington was entered on October 25, 1983. On January 6, 1984, the Supreme Court of Washington entered its order denying review from Division II of the Court of Appeals of the State of Washington.

## JURISDICTION

The jurisdiction of this court is invoked by Petitioner under 28 U.S.C. § 1257 (3).

## COUNTERSTATEMENT OF THE CASE

In 1974, Petitioner, Stanley Miller, purchased the commercial vessel named Lulu B. RP, Vol. II, page 241.

The Lulu B had originally been a tugboat, but after its purchase by Petitioner, the boat was converted into a charter fishing vessel capable of carrying passengers. RP, Vol. II, page 243. In April of 1977, Petitioner signed an agreement for the rental of a berthing space for the Lulu B with the Respondent, Port of Ilwaco. RP, Vol. II, page 256. The berthing agreement with the Respondent, Port of Ilwaco, was subject to a series of tariffs and Petitioner was provided with a copy of the tariffs before signing the berthing agreement with the Respondent, Port of Ilwaco.

Initially, Petitioner was assigned berth P-40. RP, Vol. II, page 256. When Petitioner arrived at the Port of Ilwaco with his vessel, the Lulu B, in June of 1977, however, Petitioner

discovered that berth P-40, the assigned slip, was too small to accomodate his vessel. RP, Vol. II, page 257. Accordingly, Petitioner moved the Lulu B to a vacant slip adjacent to berth P-40. RP, Vol. II, page 257. The following day, the Petitioner notified the Port that the vessel in the adjacent slip to P-40, the Lady Luck, was too large to share the berth with Petitioner's vessel. RP, Vol. II, page 257. Before the matter could be resolved, the Petitioner left the Port with the Lulu B. RP, Vol. II, page 260.

When Petitioner returned to the Port in late July, berthing space P-42 was still occupied by the vessel, Lady Luck. RP, Vol. II, page 260. In an attempt to accomodate the Petitioner, the Port agreed to allow the Petitioner to occupy berth P-2 which was on the

same float desired by Petitioner. RP, Vol. I, page 60-61, RP, Vol. II, page 260. In addition, the Port offered the Petitioner a temporary assignment in berth P-80 until the authorized renter arrived. RP, Vol. I, page 27. The Petitioner agreed to use berth P-80 on a temporary basis and according to the Respondent's records, the Petitioner utilized berth P-80 from July 22, 1977, to July 29, 1977. RP, Vol. I, page 95. Although the Respondent's records do not indicate that the Petitioner was ever assigned berth P-58, the Petitioner moved his vessel, the Lulu B, to berth P-58 on July 30, 1977. RP, Vol. I, page 27, RP, Vol. I, page 29, RP, Vol. II, page 262, RP, Vol. I, page 95.

Shortly thereafter, Steven Gaskill, the owner of the vessel assigned to berth P-58 since 1976, returned from a

temporary absence with his boat, and discovered Petitioner's vessel, Lulu B, in his berth. RP, Vol. II, page 372. Upon discovering Petitioner's boat in his berthing space, Mr. Gaskill immediately complained to Petitioner. RP, Vol. II, page 372-373. Notwithstanding Mr. Gaskill's protestations, however, the Petitioner refused to move his vessel. RP, Vol. II, page 373. Petitioner then left the Port area without the Lulu B, and could not be contacted further. RP, Vol. II, page 262. Thereupon, Mr. Gaskill immediately contacted the Port and requested the Port to remove the Petitioner's vessel from his assigned slip. RP, Vol. II, page 373.

During this same period of time, Les Petersen, the owner of the vessel in the adjacent slip to the Lulu B,

requested that the Port move the Lulu B. Mr. Petersen feared that the rough sides of the Lulu B might rub against his vessel as the Lulu B entered or exited berth P-58. RP, Vol. II, page 356. Based on these complaints, and in view of the fact that the Petitioner could not be contacted, the Respondent moved the the Petitioner's vessel, Lulu B, on August 3, 1977, to berth P-2 -- the Petitioner's assigned berth. RP, Vol. I, page 95-96.

Upon returning from Portland, Oregon, Petitioner discovered that his vessel had been moved. Whereupon, Petitioner brought suit against the Port of Ilwaco and the Port's manager, alleging business losses stemming from the Port's actions in moving the Lulu B. Trial was held in the Superior Court of the State of Washington for Pacific

County, and a verdict was returned for Respondents. On October 25, 1983, the Court of Appeals, Division II, affirmed the judgment for the Respondents. On January 6, 1984, the Supreme Court of Washington entered its order denying review of the decision rendered by Division II of the Washington Court of Appeals.

#### REASONS FOR DENYING THE PETITION

##### REASON NO. 1

Throughout this dispute, one of the principal issues has been that of determining the basis upon which the parties dealt with each other. The Respondent Port has consistently maintained that it acted pursuant to the various terms and conditions of its contract with the Petitioner just as any private party would act. Accordingly, the issue as to whether Petitioner had

any claim of right to berth P-58 should be governed solely by the applicable contract between Petitioner and Respondent.

Petitioner, however, has consistently sought to attach special significance to the fact that the Port is a municipal corporation. As such, Petitioner asserts that the Port should have accorded him procedural due process rights before it moved his boat. But, as Division II of the Court of Appeals for the State of Washington noted on pages 3 and 4 of its unpublished opinion in this matter:

Merely because the Port is a municipal corporation does not mean that its every action is subject to due process considerations.

The same rules invoked in the construction of contracts between private individuals and corporations are generally applicable in the



construction of municipal contracts. Hence, in reference to matters of contract, a municipal corporation is usually regarded and treated as a private person, and its contracts construed in the same manner and with like effect as those of private corporations and natural persons. It is regarded as a government only with respect to governmental powers granted by the state. 'It is well settled that the contracts of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties.' (Citations omitted.) 10 E. McQuillin, Municipal Corporations § 29.116 (3d ed. 1981). See also 56 Am. Jur. 2d Municipal Corporations § 498. (2d ed. 1971).

Accordingly, in view of the fact that the Respondent Port was acting as a private party pursuant to the terms and conditions of its contract with Petitioner, it is evident that the

Respondent Port did not need to afford Petitioner any procedural due process rights before it moved Petitioner's boat.

REASONS NO. 2 AND 3

Even if this Court finds that the Respondent was not acting as a private contractual party, Petitioner did not acquire a "property right" for due process purposes in berth P-58 to which he temporarily docked, and as such, Petitioner was not entitled to any due process considerations.

Under the constitutions of both the United States and the State of Washington, a State Government shall not deprive any person of life, liberty, or property without due process of law. U.S. Const., Am. XIV; Wash. Const. Art. I, Sec. 3. The Respondent Port District is a creation of the state, RCW

53.04.010 et seq, and as such, it must, absent an extraordinary situation, provide an individual with both notice and an opportunity to be heard before depriving any individual of any significant property interest. Everett v. Slade, 83 Wn.2d 80, 515 P.2d 1295 (Wa. Sup. Ct. 1973); Boddie v. Connecticut, 401 US 371, 28 L.Ed 2d 113, 91 S.Ct. 780 (U.S. Sup. Ct. 1971). By definition, however, these due process safeguards apply only where there has been a deprivation of life, liberty, or property. Port of Tacoma v. Parosa, 52 Wn.2d 181, 193, 324 P.2d 439 (Wa. Sup. Ct. 1958).

In discussing those interests that would be safeguarded by the due process clause, the U.S. Supreme Court in Board of Regents v. Roth, 408 US 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (U.S. Sup.

Ct. 1972), stated:

The requirements of procedural due process apply only to the deprivation of interests encompassed by the 14th Amendment's protection of liberty and property. When protection interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite. 408 US at 569, 570 (emphasis added).

In commenting upon the applicability of due process safeguards, the Court in Roth went on to state that:

... to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake ... We must look to see if the interest is within the 14th Amendment's protection of liberty and property. 408 US at 570, 571 (emphasis in original).

Accordingly, rather than balancing the interests of the respective parties in this situation, the Court should look at whether Petitioner had a valid claim of

right to the berth in question. Petitioner contends that due process safeguards should have been initiated before his vessel, the Lulu B, was towed from berth P-58. Any question of due process rights, however, would turn on Petitioner's claim of entitlement to berth P-58. Barnes v. Byrd, 511 F. Supp. 693 (E.D. Wa. 1981).

Petitioner's original agreement with the Respondent Port specified that the Petitioner was to be provided with a berthing space at P-40. RP, Vol. II, page 256. Petitioner himself, however, requested that he be re-assigned a new berth. RP, Vol. II, page 257. It was then made clear to Petitioner by the Respondent Port that the only other berth available for a boat of his size and configuration on the float desired by Petitioner would be berth P-2. RP,

Vol. I, page 60-61.

No bilateral agreement was reached regarding a permanent berthing space at P-58, and Port records do not indicate any formalized assignment of Petitioner's vessel to berth P-58. RP, Vol. I, page 29. In addition, the Port office employee in charge of berthing assignments could not remember any permanent assignment of Petitioner's vessel to berth P-58. RP, Vol. II, page 340. Merely because berth P-58 was substantially similar to Petitioner's originally assigned berth, P-40, and was in a very favorable location, a "very good location" for Petitioner's purposes, and it satisfied Petitioner as being comparable to berth P-40, RP, Vol. II, page 262, such did not give Petitioner a property right in berth P-58.

As the Court in Board of Regents v.

Roth, Supra at 577, stated:

...(t)o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Petitioner was told by the owner of the vessel permanently assigned to berth P-58, as well as by the Respondent Port, that berth P-58 would only be available on a temporary basis. RP, Vol. II, page 372, RP, Vol. I, page 29.

When the rightful owner of berth P-58 returned with his boat, he requested that Petitioner remove his boat to another berthing space. RP, Vol. II, page 372-373. Petitioner, however, refused to move his vessel. Instead, he left for Portland, Oregon, and refused to discuss the matter further. RP, Vol. II, page 262.

Upon the request of the owner of the vessel permanently assigned to berth P-58, and after several unsuccessful attempts to contact Petitioner by telephone, the Respondent Port removed the Petitioner's vessel from berth P-58 and placed it in berth P-2. RP, Vol. I, page 29-30. Petitioner's only authority in berthing his vessel in slips other than P-40 or P-2 was from the Respondent Port's willingness to allow Petitioner to berth his vessel in spaces that were temporarily unused while satisfactory arrangements could be worked out with Petitioner. RP, Vol. II, page 338, RP, Vol. I, page 27.

Did the Respondent Port's willingness to grant Petitioner temporary use of berth P-58 vest Petitioner with a property right in berth P-58 for due process purposes? In



Senior Citizens League, Inc. v. Dept. of Social Security, 38 Wn.2d 142, 228 P.2d 478 (Wa. Sup. Ct. 1951), the Washington Supreme Court stated:

The term 'property', as used in the due process clause, refers to vested rights. It has no reference to mere concessions or privileges which a state or municipality may control, and bestow or withhold at will. 16 C.J.S. 1195, 1198, Constitutional Law Sect. 599; 4 Selected Essays on Constitutional Law (Foundation Press 1938) 568. 38 Wn.2d at 171 (emphasis supplied).

Accordingly, it is evident that Petitioner enjoyed the use of berth P-53 only at the sufferance of the Respondent Port and consequently, such use of berth P-58 could be terminated by the Respondent Port at any time. As such, the due process rights of the Petitioner were not violated in view of the fact that he had no vested property rights in berth P-58.

#### REASON NO. 4

The Respondent Port is in agreement with Division II of the Court of Appeals for the State of Washington that this is a simple breach of contract case, and that therefore the issue of the Respondent Port's police powers need not be considered. However, if this Court disagrees with the Respondent Port and Division II of the Court of Appeals for the State of Washington with regard to this issue, the Respondent Port is compelled to emphasize that even if Petitioner some how did have a protected property interest in berth P-58, the Respondent Port was justified, pursuant to its police powers, in moving Petitioner's vessel in view of the hazard it represented to the Port and to other vessels within the Port because of its rough steel sides.

The extent of a port's powers was summarized by the Washington Supreme Court in Port of Seattle v. Washington Utilities and Transportation Commission, 92 Wn.2d 789, 597 P.2d 383, 386 (Wa. Sup. Ct. 1979):

The port, as a municipal corporation, is limited in its powers to those necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation. Christie v. Port of Olympia, 27 Wn.2d 534, 179 P.2d 294 (1947). 92 Wn.2d at 794-5.

This rule has not changed since it was announced 65 years ago by the Washington Supreme Court in State, Ex Rel. Huggins v. Bridges, 97 Wn. 553, 166 P. 780 (Wa. Sup. Ct. 1917):

'It is a general and undisputed proposition of law that a municipal corporation poses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied or incident to

the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, -- not simply convenient, but indispensable... 1 Dillon, Municipal Corporations (4th Ed.), Section 89. 97 Wa. at 556 (emphasis in original).'

Accordingly, in addition to a port authority's powers expressly provided by statute, a port authority may also exercise "implied", "incident" and "essential" powers.

Although no RCW section expressly states that the Respondent Port may move boats and re-assign berths whenever necessary to protect life or property, such powers may be implied from the Port's authority to maintain, conduct and operate boat landings under RCW 53.08.020. In addition, the parties in the instant action entered into a valid berth rental contract pursuant to RCW 53.08.080. RP, Vol. II, page 256. This contract between the respective parties

to this action was subject to the terms established pursuant to RCW 53.08.080, and port authority regulations enacted pursuant to RCW 53.08.220. Included among these terms and regulations was Provision No. 10 of Tariff No. 8: "boats may be moved by the Port manager for protection of life or property...." RP, Vol. I, page 67-69. Accordingly, it is evident that under Provision No. 10 of Tariff No. 8, the Port had authority to closely regulate the affairs of the Port.

The Respondent Port acted in accordance with its implied statutory authority, and in accordance with the authority expressly granted to it under the above-described Tariff, when it moved and re-assigned Petitioner's boat which the Port had deemed to be excessively hazardous to other boats in

the immediate area because of its rough steel sides. The Respondent Port conformed with the general rule "established by repeated adjudications that municipal corporations may exercise all powers within the fair intent and purpose of their creation which are reasonably proper to give effect to the powers expressly granted..." 62 C.J.S., Municipal Corporations, Section 117(d) at 259 (1949) (citation omitted).

In conclusion, RCW Title 53 and Provision No. 10 of Tariff No. 8, empowered the Respondent Port with the implied and express police powers necessary to move the Petitioner's boat in order to protect other boats within the Port from the hazardous condition of Petitioner's boat.

#### CONCLUSION

For the above-cited reasons, the

decision of Division II of the Court of Appeals for the State of Washington should be affirmed.

DATED this 17th day of MAY,  
1984.

Respectfully submitted,

Daniel G. Marsh  
DANIEL G. MARSH  
Of Attorneys for Respondent

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STANLEY MILLER,	)	NO. 5531-7-II
	)	
Appellant,	)	DIVISION TWO
	)	
v.	)	UNPUBLISHED
	)	OPINION
PORT OF ILWACO, a	)	
Washington Municipal	)	
Corporation, and	)	
ROBERT PETERSEN,	)	
individually, and as	)	
PORT MANAGER,	)	
	)	FILED:
Respondents.	)	October 25, 1983

REED, J. -- In April, 1977, Stanley Miller rented moorage at the Port of Ilwaco marina for his boat, the Lulu B. Miller had been renovating the Lulu B for use as a charter fishing boat since his purchase of her in 1974. Miller's plan was to cater his charter business primarily to senior citizens. At the time he leased the moorage from the Port his business was just beginning.

The Port of Ilwaco first assigned Miller's boat to space 40 on P float

APPENDIX A - 1



(P-40). The marina at the Port of Ilwaco consists of several floats. Each float is divided into berths by finger-like piers. There is one pier between every two boats, that is, two boats dock side by side between every pier. P-40 is located within 100 feet of the ramp which connects the float to the land. Miller liked this location because it allowed easy access for senior citizens. Miller first moored the Lulu B at P-40 in June, 1977, the very beginning of the charter fishing season. He found that there was insufficient maneuvering room between the Lulu B and the large boat sharing the berth. Miller complained to the Port and left with the Lulu B. When he returned in late July, space at the marina was limited. The summer boating season was in full swing. The Port was

then unable to make a permanent assignment for the Lulu B to a space close to the ramp because all those berths were assigned to other boats. The Lulu B was temporarily assigned to P-80. The Port told Miller that P-2 was available as a permanent moorage. P-2 is at the end of the float farthest from the ramp. Miller moored the Lulu B at P-80 for about one week in late July, 1977. Then he began mooring her at p-58. P-58 is close to the ramp and an ideal location from Miller's point of view. The difficulties commenced. The boat owner assigned to P-58 complained to Robert Petersen, the Port manager, about the Lulu B being moored in his space. The owner of the boat moored next to the Lulu B in P-58 also complained; he feared the rough state of the Lulu B's steel exterior might damage

his wooden boat. On August 3, 1977, without notifying Miller, Robert Petersen had the Lulu B towed from P-58 to P-2 at the far end of the pier.

Miller filed suit against the Port of Ilwaco and its manager, Robert Petersen, in October, 1978. He alleged that the removal of his boat from P-58 to P-2 was a breach of contract or "arbitrary and capricious action" entitling him to damages. The damages claimed were profits lost from his charter fishing business and the loss of his boat to creditors. The case was submitted to the jury on both theories. The jury returned a general verdict in favor of the defendants. Miller appeals.

In his attack on certain jury instructions either given or refused, Miller attempts to make a constitutional

argument. Relying on such authorities as Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780 (1971) and Ritter v. Board of Comm'r of Adams Cy. Pub. Hosp. Dist. 1, 96 Wn.2d 503, 637 P.2d 940 (1981), he claims he had a "property interest" in his berth at the Port. Pursuing a tortured interpretation of such procedural due process decisions, he contends the Port - because it is a governmental agency - was required to give him "notice and an opportunity to be heard" before it ousted the Lulu B from P-58, i.e., deprived him of his "property interest".

Nonsense! This is a simple breach of contract case. Merely because the Port is a municipal corporation does not mean that its every action is subject to due process considerations.

The same rules invoked in the construction of contracts

between private individuals and corporations are generally applicable in the construction of municipal contracts. Hence, in reference to matters of contract a municipal corporation is usually regarded and treated as a private person, and its contracts construed in the same manner and with like effect as those of private corporations and natural persons. It is regarded as a government only with respect to governmental powers granted by the state. 'It is well settled that the contracts of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties.'

(Citations omitted.) 10 E. McQuillin, Municipal Corporations §29.116 (3d ed. 1981). See also 56 Am.Jur.2d Municipal Corporations § 498. (2d ed. 1971).

Here, the Port was engaged in the furtherance of its proprietary, as opposed to its governmental, functions. Its actions were neither legislative nor

quasi-judicial in nature. Being empowered to do so, it contracted with Miller just as any private person would do. That contract incorporated the terms and conditions of the Port's regularly adopted tariff, the provisions of which specifically reserve to the Port the right to assign berths and relocate boats.

Because this was an action for breach of contract - nothing more, nothing less - under the instructions to which no proper exceptions were taken, it was incumbent on Miller to establish his contractual right to a particular berth. He obviously failed to convince the jury, either that he was entitled to P-58, or that the Port breached its contract by moving the Lulu B. Because the jury returned a general verdict for the defendants, it must be presumed the

jury found against Miller on this issue. See Golberg v. Sanglier, 96 Wn.2d 874, 639 P.2d 1347 (1982); DeYoung v. Campbell, 51 Wn.2d 11, 315 P.2d 629 (1957).

It is regrettable that the Port chose to assert that it was exercising its "police powers" when it moved the Lulu B. By doing so, the Port merely stimulated more due process protestations from Miller and helped becloud the otherwise clear-cut issues, both here and in the trial court. There is no due process issue and Miller failed to prove breach of contract.

Miller's final assignment of error, being patently without merit and unsupported by authority, will not be considered. DeHeer v. Seattle-Post Intelligencer, 60 Wn.2d 122, 372 P.2d 193 (1962).

The Port of Ilwaco and Robert Petersen request this court to award their reasonable attorney's fees as terms and sanctions against Miller for bringing a frivolous appeal. See RAP 19.9(a). We agree the appeal verges on the frivolous. However, as noted, the defendants added to the confusion and provided Miller with some basis for his argument when they introduced the subject of police power. In the circumstances we decline to impose sanctions.

The judgment for the defendants is affirmed; terms against Miller are denied.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is



so ordered.

/s/ Reed, J.

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WE CONCUR:

/s/ Petrich, C.J.

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/s/ Worswick, J.

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